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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 487

LEVER BROTHERS COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal From the United States District Court for the Southern District of Ohio, Western Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant Lever Brothers Company appeals from an order of the United States District Court for the Southern District of Ohio sustaining a motion by the Procter & Gamble Company to quash a subpoena duces tecum obtained by Lever Brothers. Lever Brothers also appeals from an order of that court denying a motion by Lever Brothers to compel answers to questions propounded at an oral deposition.

OPINION BELOW

The opinion of the Cincinnati district court (John Peck, J.) sustaining a motion by the Procter & Gamble Company, et al., to quash a subpoena issued at the request of Lever Brothers Company is embodied in a letter addressed to counsel for Procter & Gamble Company dated July 3, 1962. The Court's letter is reprinted in the Appendix, *infra*, p. 21a. The district court did not issue any opinion in connection with an order denying a motion by Lever Brothers Company to compel answers to questions propounded at an oral deposition.

JURISDICTION

The United States instituted an action in the district court for the Southern District of New York against Lever Brothers Company and Monsanto Chemical Company under Section 15 of the Clayton Act, 15 U.S.C. 15, alleging that Monsanto's transfer to Lever of the trademark "all"—a name used on a low sudsing, synthetic detergent product—violated Section 7 of the Clayton Act, 15 U.S.C. 18. On July 13, 1962, the district court for the Southern District of Ohio entered an order sustaining a motion by the Procter & Gamble Company to quash a subpoena duces tecum which Lever Brothers had caused to be served upon a Procter & Gamble executive. On July 24, 1962, the district court for the Southern District of Ohio entered an order denying a motion by Lever Brothers to compel answers to certain questions propounded orally by Lever to a Procter executive and covering the same subject matter as the subpoena duces tecum which had previously been quashed. On August 6, 1962, Lever Brothers filed a notice of appeal to this Court.

Lever Brothers filed a second notice of appeal to the Court of Appeals for the Sixth Circuit on August 10, 1962, to guard against a possible claim that the orders appealed from are not subject to review by this Court under Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29.

The jurisdiction of this Court to review by direct appeal the orders of the district court is conferred by Section 2 of the Expediting Act, *supra*. *Brown Shoe Co.* v. *United States*, 370 U.S. 294.

QUESTIONS PRESENTED

The United States instituted an antitrust suit in the district court for the Southern District of New York against Lever Brothers Company and Monsanto Chemical Company alleging that Monsanto's transfer to Lever of the trademark "all"—a name used on a low-sudsing, synthetic detergent product—violated Section 7 of the Clayton Act, 15 U.S.C. 18. Lever Brothers informed the district judge in New York to whom the case has been assigned for all purposes. (Archie O. Dawson, J.) that certain information respecting the detergent products sold by the Procter & Gamble Company would be essential for the reason that Procter is the dominant firm in the industry by a substantial margin. The ultimate issue in the present case is whether Lever Brothers' acquisition of the trademark "all" will substantially lessen competition; information as to Procter & Gamble has a critical bearing upon the resolution of that question.

With Judge Dawson's concurrence, Lever Brothers took steps to secure the necessary data from Procter & Gamble. However, the district judge in Cincinnati, Ohio, (Peck, J.) refused to allow Lever Brothers

access to the information. He sustained in its entirety a Procter & Gamble motion to quash a subpoena duces tecum obtained by Lever Brothers, and he refused to require the information to be furnished orally on deposition. As a result of these rulings, the district court in New York has been deprived of data essential to informed adjudication of this case, and Lever Brothers is seriously prejudiced in the conduct of its defense.

The questions presented to this Court are:

I. Whether the district court in Cincinnati departed in the present case from the accepted and usual course followed by the courts in ruling upon discovery matters in antitrust cases in that it denied access to information concerning brands marketed by the dominant firm in the industry which is (i) required by the trial court in New York for an informed judgment respecting the competitive effect of the challenged acquisition, and (ii) is indispensable in connection with the defense asserted by the appellant in the present case.

II. Whether, as a matter of proper judicial administration of protracted antitrust cases and in the circumstances shown by the record in the present case, the district court for the Southern District of Ohio should have directed the Procter & Gamble Company to file its objections with the district judge in the Southern District for New York to whom this antitrust case has been assigned "for all purposes."

STATUTES INVOLVED

The relevant portion of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, reads as follows:

> In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an

appeal from the final judgment of the district court will lie only to the Supreme Court.

The first paragraph of Section 7 of the Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 18, reads as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

STATEMENT

1. In May, 1957, the Monsanto Chemical Company entered into an agreement with Lever Brothers Company which provided for the transfer to Lever of the trademark "all"—a name which had been used by Monsanto on a low-sudsing, synthetic detergent product. In July, 1958, the United States brought an action in the district court for the Southern District of New York against Lever Brothers and Monsanto alleging that this transaction violates Section 7 of the Clayton Act, 15 U.S.C. 18.

2. At an early point in the New York proceeding, the government, consistent with its usual practice in protracted antitrust cases, moved for an order assigning the present case to a single judge.

> "*for all purposes including the hearing of all motions and other applications preliminary to trial in this cause, the conducting of all pre-trial procedures,* and the presiding at the trial of this cause, and for such other and further relief as to the Court may seem proper." ("Motion for Assignment of Judge," Feb. 5, 1960, *United States*

v. *Lever Brothers Co. and Monsanto Chemical Co.*, C.A. 135-219, S.D.N.Y.). (Emphasis supplied).[1]

The government's motion was granted, and the case was assigned "for all purposes" to Judge Irving Kaufman, then a district court judge. After Judge Kaufman's elevation to the Court of Appeals for the Second Circuit, the present case was assigned to Judge Dawson "for all purposes." Judge Dawson is currently presiding over pre-trial preparation of this case.

3. Shortly after the complaint was filed, the government instituted an extensive discovery program against the defendants and various third parties, including the Procter & Gamble Company, the dominant firm in the detergent industry. The government obtained voluminous information from Lever and Monsanto, including figures showing sales, profits, and advertising and promotion expenditures for each of the detergent brands sold by defendants. The government also asked Procter & Gamble, among other things, for the net sales revenue realized by Procter on each of its detergent brands and Procter's advertising and promotion expenditures by brands. The government however, failed to obtain this per brand information from Procter.[2]

[1] The government's memorandum accompanying its motion pointed out that the present case clearly meets the definition of a "long and complicated case," and that it is a "major antitrust" action involving "the soap and detergent industry, a major segment of the national economy." ("Mem. In Support of Plaintiff's Motion for Assignment of a Judge," pp. 2-3).

[2] The government addressed written interrogatories to Procter & Gamble under Rule 33, Fed. R. Civ. P., which called, among other things, for the following data:

"7. State the net sales revenue derived by your Company from each product listed in Interrogatory 3 or identified in

The government was directed by the district court in New York to turn over to Lever such data as it had obtained from Procter & Gamble. *United States v. Lever Brothers Co. and Monsanto Chemical Co.*, 193 F. Supp. 254, 256 (S.D. N.Y.). In ruling that Lever Brothers was entitled to this information, Judge Kaufman, quoting from a brief filed by the government in the present case, stated:

> "To try a Section 7 case in the detergent industry without information concerning Procter & Gamble would be like trying an automobile industry case without information with respect to General Motors." (*United States v. Lever Brothers Co. and Monsanto Chemical Co.*, 193 F. Supp. 254, 256 (S.D.N.Y.).

---

answers to Interrogatories 4 through 6 above [i.e., each Procter detergent brand] during each year 1953 through 1957 and for each half year in 1958 and 1959.

* * *

"12. State the following for each year 1953 through 1957 and for each half year during 1958 and 1959:

a) the total amount spent by your company for advertising and promotion;

* * *

e) the amount your Company spent in advertising and promoting each individual product either listed in Interrogatory 3 or identified in response to Interrogatories 4 and 5 [i.e., each Procter detergent brand]."

These interrogatories were never answered by Procter; the government entered into a stipulation with Procter, to which Lever was not a party, agreeing to withdraw these questions. ("Stipulation" dated Nov. 14, 1960, United States v. Lever Brothers Co. & Monsanto, C.A. 135-219, S.D.N.Y.);

4. At a pre-trial conference, Lever Brothers informed Judge Dawson that it would be essential for informed adjudication of this case to have additional information with respect to the detergent brands marketed by Procter & Gamble for the reason that Procter & Gamble was the Number 1 firm in the industry by a substantial margin:

> [Counsel for Lever] . . . [T]he figures as to Procter will become of extreme importance.
> The Court [Judge Dawson]: I think they are extremely important; I agree with you.
>
> * * *
>
> [Counsel for Lever] . . . I say you need this [profit and promotional and advertising] data from Procter & Gamble to underpin what I think must ultimately be the conclusion here.
>
> [Judge Dawson]: I think we will have to get that, but the important thing now is to get this moving. . . . (Minutes of Pre-Trial Conference, March 12, 1962, pp. 79, 84, *United States* v. *Lever Brothers Co. and Monsanto Chemical Co.*, C.A. 135-219, S.D.N.Y.).

5. Lever Brothers then took formal steps to secure the necessary information. Lever Brothers noticed depositions under Rule 26, Fed. R. Civ. P., of three Procter & Gamble executives, and Lever caused subpoenas to be served in Cincinnati, Ohio, upon these three Procter employees.[3] A subpoena duces tecum addressed to one of these executives, R. S. Runnels, Comptroller of Procter & Gamble, called for the production of records or schedules showing, in sub-

[3] Procter & Gamble's principal place of business is located in Cincinnati.

stance, the advertising and promotion expenditures, profits, and research expenditures for the period 1950-1958 for each of Procter's various detergent brands identified by the government as products within the relevant line of commerce.

Procter & Gamble filed a motion in the district court for the Southern District of Ohio to quash the subpoena duces tecum and to preclude Lever from inquiring on oral depositions into any of the topics covered by the subpoena duces tecum. Lever Brothers asked the Ohio district court to direct Procter to address its motion to the District Judge in New York to whom this case had been assigned for all purposes. This Lever Brothers request was denied.

6. Lever Brothers submitted to the district court in Cincinnati that the information was required by the trial court in New York for the following reasons:

(i) This case involves a charge that the acquisition[4] of a single trademark may substantially lessen competition or tend to create a monopoly. A decision as to this issue requires consideration of economic and financial data, respecting the principal competitive brands sold in the industry.

(ii) The information required for an informed adjudication includes, among other things, sales, advertising and promotion expenditures, and profit figures for each brand which is deemed to be within

[4] Lever Brothers did not acquire any plants, production facilities, or capital stock of Monsanto. In other words, there was no fusion between the two companies. Contrast *Brown Shoe Co.* v. *United States*, 370 U.S. 294; *Maryland and Virginia Milk Producers Assn. Inc.* v. *United States*, 362 U.S. 458. Lever acquired the existing inventory of "all" and certain patent rights but these are really peripheral to the central issue which involves the trademark itself.

the relevant line of commerce.[5] Since this case relates primarily to the competitive significance of an acquired trademark, and since the commercial value of a trademark is determined by consumer acceptance which in turn is heavily influenced by advertising, statistics with respect to advertising are indispensable. The importance of advertising in the soap business is common knowledge. Further, advertising and promotion expenditures are necessary to the evaluation of the relative competitive standing of different brands.

Lever contended that it is relevant in a Section 7 case to compare the profits of the two parties to the acquisition with the profits of other firms in the industry. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, at 617 (S.D.N.Y.).[6] Data as to research is required for the reason that the magnitude of Procter's expenditures on research in the detergent field are pertinent in assessing the likelihood that "all" could have survived as a competitive factor against Procter in the hands of any firm other than Lever Brothers.

(iii) The Procter & Gamble Company is by far the dominant firm in the detergent industry, and the

[5] There is a dispute between the government and defendants with respect to the relevant line of commerce in the present case. For purposes of the subpoena duces tecum, Lever took the line of commerce as defined by the government, namely all heavy duty detergent products, and asked for information only with respect to the Procter & Gamble products within that line. Procter & Gamble manufactures a great number of other products as to which no information was requested.

[6] Lever Brothers informed the district court in Cincinnati that Lever expected to prove at trial that Lever and Monsanto had lost large sums in marketing heavy duty detergents during a period when Procter was realizing large profits.

individual brands its sells occupy premier positions. Figures placed before the Ohio district court, originally submitted by Procter & Gamble to the Federal Trade Commission in another proceeding, showed as follows:[7]

PERCENTAGE OF PACKAGED HEAVY DUTY DETERGENT SALES IN THE UNITED STATES BY ALL COMPANIES

	1955	1956	1957
Procter & Gamble	55.6	54.9	55.7
Lever Brothers	17.2	16.8	16.8

In 1957, when the Lever-Monsanto agreement was entered into, sales of one Procter heavy duty detergent brand, "Tide," exceeded sales of all Lever detergent products combined. These same statistics showed that in 1957, "all" accounted for only 6% of all packaged heavy duty detergent sales. The Procter & Gamble product "Dash" is the principal competitor of "all" in the low sudsing detergent field.

With respect to the merits of the motion to quash, Procter & Gamble contended, in essence, that the information sought constitutes confidential business records, and that its disclosure would be detrimental to Procter's competitive status. Procter also argued that it had already produced a substantial volume of information in connection with the present case.

The government neither opposed nor supported Lever's discovery request. The government informed the Cincinnati district court that "Procter & Gamble's motion to quash the Lever Brothers subpoena is a third party proceeding in which the Government is

[7] The figures were filed in the district court in New York by the government in this case and they are attached as an exhibit to the Affidavit of Abe Krash submitted to the Cincinnati court which is part of the certified record.

not a party of interest" and that "the Government takes no position with respect to the merits of Procter & Gamble's motion to quash." (Letter, Lee Loevinger, Esq., Assistant Attorney General, Antitrust Division; to Hon. John Peck, May 23, 1962). The government reserved the right to object to introduction of the data when offered at the trial in New York.

7. The Ohio district court sustained Procter & Gamble's motion to quash in its entirety. Judge Peck held that good cause had not been shown for the production of the data,[8] and that "much information in the general area of that contemplated by the subpoena had already been made available to the defendant . . ."[9] (p. 21, *infra*) He distinguished an earlier opinion by Judge Kaufman, then presiding judge in the present case in New York, who had directed that certain Procter data in the government's

[8] The Court below erroneously assumed that the requirement of "good cause" in Rule 34, Fed. R. Civ. P. is applicable to a subpoena duces tecum addressed to a third party under Rule 45. Rule 34, of course, was not relevant. See *Horizons Titanium Corp.* v. *Norton Co.*, 290 F.2d 421, 425, n. 6 (1st Cir.). Procter & Gamble was required to establish that the subpoena was "unreasonable or oppressive" (Rule 45(b)). As a leading commentator puts it: "If the subpoena is for the production of documentary evidence on the taking of a deposition, the test of its propriety is relevancy, rather than materiality or admissibility, and the subpoena should be upheld unless it is 'palpable that the evidence sought can have no possible bearing upon the issues.'" 5 *Moore's Federal Practice* p. 1723 (2d ed. 1951). In any event, Lever submits that the necessity for the data was clearly shown.

[9] None of the data called for by the subpoena was in Lever Brothers' possession. Runnels, one of the subpoenaed Procter executives, admitted that Procter & Gamble had never turned over any data in the present case showing advertising and promotion expenditures or profit figures by brands. (Runnels Deposition Tr. pp. 9-10, 17-18).

possession be furnished to Lever, on grounds that the earlier data "did not 'contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor.' "[10]

8. Lever thereafter attempted to secure the data called for by the subpoena duces tecum through an oral deposition of a Procter executive. The deponent was instructed by counsel for Procter & Gamble not to answer questions such as those which follow relating to "Dash," a low sudsing, synthetic detergent product marketed by Procter which is directly competitive with "all":

> "What were the advertising expenditures on Dash in 1955?"
>
> "What was Procter's profit on the product Dash in 1955?"
>
> "What were the advertising expenditures by Procter & Gamble in advertising Dash on television in 1955?"
>
> "How much was expended by Procter in couponing Dash in 1955?" (Runnels' Deposition Tr., pp. 13, 18, 19, 20).

A motion by Lever to compel answers to these interrogatories was denied by Judge Peck on the basis of his previous ruling quashing the subpoena duces tecum.

In sum, the district court in Ohio refused to permit access to any statistical or financial information by

[10] The Court below erroneously assumed that the information previously furnished to the government by Procter & Gamble which Judge Kaufman ordered turned over to Lever did not include any data on a brand basis. The data produced in fact included figures showing percentage estimates of sales by brand.

brand with respect to products marketed by the dominant firm in the industry which are within the relevant line of commerce as defined by plaintiff. It is these rulings which Lever seeks to have reviewed by this appeal.

THE QUESTIONS ARE SUBSTANTIAL

1. This appeal raises substantial questions with respect to judicial administration of the antitrust laws. The adjudication of cases under Section 7 of the Clayton Act requires detailed analysis of economic data with respect to the principal products and firms found to be within the relevant line of commerce. As the Court observed in *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n. 38, the Federal Trade Commission and the district courts have "recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case." Information concerning the brands sold by Procter & Gamble is obviously indispensable in deciding the present case. The ultimate issue in the present case is whether Lever's acquisition of the single trademark "all" will lessen competition within the meaning of Section 7. A decision as to that question in turn requires a meticulous comparison among "all" and various competitive products. Procter & Gamble produces the principal directly competitive brand—"Dash"—and it is the dominant firm in the detergent industry by a very substantial margin, p. 11, *supra*.

The necessity for information as to Procter was recognized by the trial judge in New York to whom this case has been assigned for all purposes. He

agreed that figures as to Procter & Gamble "are extremely important," and when counsel for Lever notified him that Lever contemplated discovery proceedings for the purpose of obtaining such information, he declared, "I think we will have to get that." (p. 8, *supra*.)

The government also recognized the necessity for much of the very data sought by Lever Brothers. The government itself called upon Procter & Gamble at an earlier stage in the present litigation for much of the identical information (pp. 6-7, *supra*), but the government did not obtain the data (*ibid*). And in connection with an earlier discovery proceeding relating to Procter & Gamble data, the government informed Judge Irving Kaufman, then presiding judge in this case:

> "To try a Section 7 case in the detergent industry without information concerning Procter & Gamble would be like trying an automobile industry case without information with respect to General Motors." (*United States* v. *Lever Brothers Co. and Monsanto Chemical Co.*, 193 F. Supp. 254, 256 (S.D.N.Y.).)

In brief, the ruling of the Cincinnati district court denies the district court in New York of data essential to informed adjudication, and it seriously prejudices Lever Brothers in the conduct of its defense.

2. The decision below is a precedent for an extremely restrictive view of discovery in Section 7 cases, and it has important implications with respect to judicial administration of antitrust cases. Suits under Section 7 of the Clayton Act constitute an increasingly important segment of the antitrust litigation instituted by the Justice Department and the Federal Trade Commission. In 1961, "the Department brought 19

cases, a record number against mergers or prospective mergers as anticompetitive." Department of Justice Press Release, Jan. 22, 1962; see also Rowe, *Mergers and the Law: New Directions for the Sixties*, 47 A.B.A. J. 1074 (1961). Financial and statistical information with respect to other products and firms in the industry is, of course, indispensable to a just disposition of such cases. The principles of discovery apply equally to the government and to defendants, so that the ruling below will handicap not only defendants but the government as well as the trial courts.

The decision below also cannot be reconciled with the principles of discovery applicable to all proceedings generally. The Cincinnati court sustained Procter's objections in part upon the theory that the data called for was confidential business information, p. 22, *infra*. Even if that point were valid—and we deny that it is—the proper action was not an order denying discovery in toto but an appropriate protective order which would safeguard secrecy. Information is not immune from discovery because it is allegedly confidential business intelligence.[11] Cf. *United States* v. *St. Regis Paper Co.*, 368 U.S. 208.

3. Lever submits that considerations of judicial economy and efficiency, orderly judicial control of

[11] Lever submits that the confidential nature of the information was grossly exaggerated by Procter. The most recent information sought was for the year 1958; most of it was from an earlier period. In a technologically dynamic industry like the detergent industry statistics four years old are of virtually no contemporary commercial significance—they are "old hat." Further, it borders on the fanciful to suggest that disclosure of this archaic statistical information could somehow have impaired the competitive position of a firm controlling nearly 60% of a market, nearly three times the size of its nearest competitor.

pretrial discovery proceedings in a complex case, and the comity owing from one court to another should have led the district court in Cincinnati to direct Procter & Gamble to address its motion to quash to the district court in New York. The New York court was in the best position to appraise the relevance of the material sought by Lever Brothers since it was familiar with the issues presented by the government's complaint. It was in the best position to weigh the importance of the information sought against Procter & Gamble's claim that it would suffer competitive injury. And it was in the best position to enter any protective order and to supervise the discovery mechanics. In short, the district court in New York had ultimate responsibility for deciding this case, and a motion of far reaching consequence should have been adjudicated by that court.

The ruling of the Court below cannot be squared with these considerations or with repeated recommendations during the past decade by every agency which has considered the unique problems presented by protracted cases. The 1951 study of the Judicial Conference of the United States—the "Prettyman Report"—specifically recommended that in antitrust cases

> "All preliminary motions should be considered and disposed of by the judge who will hear and determine the cause." (13 F.R.D. 41 at 83.)

The federal circuit and district judges attending the *Seminar on Protracted Cases Held at The New York University Law Center* resolved that

> "The long protracted case should be assigned upon its filing to one judge, and *such judge should handle all proceedings therein.*" (21 F.R.D. 395 at 520 (1957)).

Similarly, the *Seminar on Protracted Cases* at Stanford University, 23 F.R.D. 319 (1958), concluded that:

> "Little elaboration of this point seems necessary, for substantially every commentator, writer or authority who has considered the problem of the big case has concluded that *the entire case should be promptly assigned to a single judge for all purposes.*" (23 F.R.D. at 392). (Emphasis supplied).

The government stated to the Ohio district court in the present case that "We would in no way oppose the transfer of this discovery hearing to Judge Dawson since he is familiar with the legal and factual issues involved in the litigation and charged with the responsibility of ultimately deciding the case on its merits." (Letter, Lee Loevinger, Esq., Assistant Attorney General, Antitrust Division, to Hon. John Peck, May 23, 1962). The government stated, however, that it was "uncertain as to whether a third-party deponent can be required under Rule 45(b) of the Federal Rules of Civil Procedure to submit a motion to quash to a Court other than the Court for the district in which the deposition is to be taken and in which the deponent resides." (*Ibid.*) Lever believes that the Ohio court had authority, in the circumstances of this case, to make such a ruling. The Ohio court had jurisdiction over Procter & Gamble and the three Procter executives. It has long been settled "that a party subject to the jurisdiction of . . . [a] court can be ordered to institute, defend, or appear in proceedings in another state." *Equitable Trust Co.* v. *Schwebel*, 40 F. Supp. 112, 114 (E.D. Pa.), aff'd, 117 F. 2d 738 (3d Cir.). The applicable principle

is formulated in the A.L.I., *Restatement of the Law of Conflicts of Laws*, Section 95 (1934), as follows:

> "A state can exercise through its courts jurisdiction to order a party subject to its jurisdiction to institute proceedings in a court or other governmental agency in another state or to defend or appear in such proceedings."

In any event, the issue, characterized by the government as "uncertain," should be authoritatively resolved.

CONCLUSION

We believe the questions presented by this appeal are substantial and of public importance, and that probable jurisdiction should, therefore, be noted.

Respectfully submitted,

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October, 1962

APPENDIX

Opinion of District Court for the Southern District of Ohio

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI 2

JOHN W. PECK
Judge

July 3, 1962

Dinsmore, Shohl, Barrett, Coates & Deupree
Union Central Building
Cincinnati 2, Ohio

Re: Civil Action No. 5054
UNITED STATES OF AMERICA
v.
LEVER BROS. CO., ET AL.

Gentlemen:

After a review of the transcript of the arguments of counsel relative to the motion of certain parties named in a subpoena duces tecum in the above action to quash said subpoena, and of the voluminous affidavits and memoranda submitted in connection therewith, it has been concluded that the motion is well taken.

This conclusion is based on the failure of the defendant to show good cause to require production of the detailed information sought. Much information in the general area of that contemplated by the subpoena has already been made available to the defendant by the use of cross interrogatories and through motion requiring the United States to produce information. In resisting the motion, defendant relies strongly on the learned opinion in United States v. Lever Bros., 199 F. Supp. 254 (S.D.N.Y. 1961), but in contrast to the situation here existing it will be noted that that decision was concerned with figures which did not

"contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor."

An entry sustaining the motion to quash subpoena duces tecum and overruling the motion to limit scope of deposition examination for the reason indicated at the time of the oral argument (Transcript, p. 5), endorsed by counsel for the parties concerned, may be presented.

Yours truly,

JOHN W. PECK

cc: Paxton & Seasongood
Mr. James J. Coyle

Orders by District Court for the Southern District of Ohio

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

UNITED STATES OF AMERICA, *Plaintiff*,

v.

LEVER BROTHERS, ET AL., *Defendants*

ORDER

This cause came on to be heard on the motions of The Procter & Gamble Company, Richard S. Runnels, Albert N. Halverstadt and John W. Hanley to quash the subpoena duces tecum addressed to Richard S. Runnels and to limit the scope of deposition examination of Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, pursuant to subpoenas heretofore issued to appear and testify on behalf of Lever Brothers. The Court, having heard argument of counsel and having considered the affidavits and memoranda submitted by the parties and being fully ad-

vised in the premises, finds that the motion to quash the subpoena duces tecum to Richard S. Runnels should be, and hereby is, sustained, and it is ordered that the said subpoena duces tecum be quashed. The Court further finds that the motion to limit the scope of deposition examination is premature, said depositions not having been commenced, and it is therefore ordered that the motion to limit the scope of deposition examination is overruled.

/s/ John W. Peck (J)
United States District Judge

Dinsmore, Shohl, Barrett, Coates & Deupree

/s/ Richard Barrett

Attorneys for The Procter & Gamble Company, R. S. Runnels, A. N. Halverstadt and J. W. Hanley.

No objection as to form

/s/ Paxton & Seasongood

Attorneys for Lever Brothers

Dated: July 13, 1962

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

United States of America, *Plaintiff*

v.

Lever Brothers, et al., *Defendants*

Order

This cause came on to be heard on the motion of Lever Brothers Company for an order to compel Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, witnesses subpoenaed to testify on behalf of Lever Brothers Company, to answer certain questions propounded on oral

deposition examination which the witnesses declined to answer on the instruction of counsel. It appearing that the questions call for the same information as contained in the books and records of The Procter & Gamble Company identified in Schedule "A" to the subpoena duces tecum addressed to Runnels, which the Court ordered quashed on July 13, 1962,

It is Ordered that the motion should be, and hereby is, denied.

/s/ JOHN W. PECK (J)
United States District Judge

/s/ RICHARD BARRETT

DISSMORE, SHOHL, BARRETT, COATES & DEUPREE,
Attorneys for The Procter & Gamble Company,
R. S. Runnels, A. N. Halverstadt and
J. W. Hanley.

No objection as to form

/s/ ABE KRASH
Attorneys for Lever Brothers Company

Dated: July 24, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 487

LEVER BROTHERS COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, THE PROCTER & GAMBLE COMPANY, ET AL.

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CINCINNATI, OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. ———

LEVER BROTHERS COMPANY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, THE PROCTER & GAMBLE COMPANY, ET AL.

The Appellee, The Procter & Gamble Company, (herein referred to as "Procter") a party to the discovery proceedings from which this appeal is sought to be taken respectfully moves pursuant to Rule 16 of this Court, to dismiss the instant appeal, on the ground that it is not within the jurisdiction of this Court because this appeal is not authorized by the Expediting Act, 15 U.S.C. § 29, and, therefore, not in conformity to statute; or, in the alternative, to affirm the rulings below on the ground that it is manifest that the

questions on which the decision of the cause depend are so unsubstantial as not to need further argument. The individuals R. S. Runnels, A. N. Halverstadt and J. W. Hanley, to whom the discovery process was directed, join The Procter & Gamble Company in these Motions.

OPINION BELOW

The opinion and orders below are set forth in Appellant's brief and for the convenience of the Court they are also included in the Appendix herein at pages 1a-4a.

STATUTES AND RULES INVOLVED

The Expediting Act, 15 U. S. C. § 29; Section 7 of the Clayton Act, 15 U. S. C. § 18, and the applicable sections of Rules 30 and 45 of the Federal Rules of Civil Procedure are set out in the Appendix at pages 5a-7a.

PRELIMINARY STATEMENT

This is an attempted appeal by Lever Brothers Company (herein referred to as "Lever") from two discovery orders entered by the District Court for the Southern District of Ohio. Procter and the individual deponents are not parties in the principal action which is pending in the District Court for the Southern District of New York. The trial of this action has not yet commenced.

The United States instituted that action under the anti-trust laws in the District Court for the Southern District of New York against Lever and Monsanto Chemical Company, alleging that Lever's acquisition of the property rights in a synthetic detergent product "All" from Monsanto violated Section 7 of the Clayton Act, 15 U. S. C. 18.

On May 1, 1962, Lever served notice of the taking of the depositions of three of Procter's employees, the individuals named above. On the same date, Lever obtained sub-

poenas from the Clerk of the United States District Court for the Southern District of Ohio, Western Division, the district in which they resided, to compel their attendance as witnesses. One of the subpoenas was a subpoena duces tecum directing the employee, R. S. Rennels, to bring certain records of his employer, The Procter & Gamble Company, with him to the deposition proceeding.

The Procter & Gamble Company and the individual deponents filed in the District Court for the Southern District of Ohio, Western Division, the Court from which the subpoenas issued, motions to quash the subpoena duces tecum under Rule 45 of the Federal Rules of Civil Procedure and to limit the scope of deposition examination under Rule 30 of the Federal Rules of Civil Procedure. By these motions it was asserted that Procter should be protected from disclosing valuable and confidential trade secrets to Lever, a competitor.

After considering extensive affidavits and memoranda filed by both Procter and Lever, on July 13, 1962, the District Court in Ohio granted the motion to quash the subpoena duces tecum and overruled the motion to limit the scope of the deposition examination. Thereafter, Lever commenced oral examination of the deponents and sought to elicit substantially the same information which was contained in the documents called for in the quashed subpoena duces tecum. On advice of counsel, the deponents refused to answer and Lever sought an order from the District Court for the Southern District of Ohio, Western Division, to compel the deponents to answer the questions propounded by Lever. On July 24, 1962, the District Court denied this motion.

Lever filed a notice of appeal on August 6, 1962 to this Court, and on August 10, 1962 Lever filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit.

QUESTION PRESENTED

There is but one question presented by this appeal: Did the District Court from which the subpoenas issued abuse the discretion lodged in that Court under Rules 30 and 45 of the Federal Rules of Civil Procedure by granting the motion of The Procter & Gamble Company et al. to quash the subpoena duces tecum calling for discovery in an action pending and not yet tried in another district of valuable and confidential trade secrets of a financial nature and by limiting the scope of deposition examination of the subpoenaed discovery witnesses so as not to disclose that data to a competitor?

ARGUMENT

I. Appellate Jurisdiction Under the Expediting Act Is Limited to the Review of Final Judgments in Civil Antitrust Actions in Which the United States Is the Complaining Party. In the Present Case No Final Judgment Has Been Entered.

The very statement of the Questions Presented in this appeal invites a challenge of the jurisdiction of the Court to hear the appeal at this stage of the case below. The orders which Lever now asks this Court to review are clearly interlocutory. They are pretrial discovery orders in a case whose trial has not begun—no other type of order is likely to be more obviously interlocutory. This Court has consistently held that the words "final judgment" in the Expediting Act mean precisely what they say and that Congress thereby intended to preclude appeals from interlocutory orders either to this Court or to a court of appeals in the class of antitrust actions covered by the Expediting Act. This position was reiterated very recently in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962), wherein the opinion of the court stated at page 305:

"In a civil antitrust action in which the United States is the complainant that Act (15 U. S. C. § 29) provides for a direct appeal to this Court from the *final* judgment of the district court." (emphasis by the Court)"

"" Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States* v. *California Co-operative Canneries*, 279 U. S. 553, 558."

Justice Harlan took the position that the appeal in the *Brown Shoe* case should have been dismissed for lack of finality because the terms of the divestiture decree had not been fixed by the district court. In his opinion, Justice Harlan noted that speedy disposition of civil antitrust action brought by the United States was a "major policy consideration" disclosed by the legislative history of the Expediting Act and that

". . . it was entirely consistent with its desire to expedite these cases for Congress to have eliminated the time-consuming delays occasioned by interlocutory appeals either to intermediate courts or to this Court." (370 U. S. at page 358)

If a direct appeal could be taken to this Court from interlocutory discovery orders of the type involved herein, the policy of the Expediting Act would be completely flouted. This Court would, in effect, be looking over the shoulder of every district court throughout the pretrial, trial, relief and judgment stages of all civil antitrust cases brought by the United States. Cases of this type which are notoriously "protracted" would become even more "protracted" should

an appeal of this type be now recognized. Clearly, Lever is seeking to circumvent both the plain meaning and policy of the Expediting Act by this application for piecemeal review.

In a case decided soon after the Expediting Act was passed, *Alexander* v. *United States*, 201 U. S. 117 (1906), this Court held that an order of a district court directing a third-party witness to produce documents and to testify before a special examiner in an antitrust action brought by the United States was not a final order and, consequently, not appealable to the Supreme Court.

There the antitrust action was brought in the Circuit Court for the District of Minnesota. The United States obtained an order from the Circuit Court for the District of Wisconsin for the issuance of a subpoena duces tecum to the witnesses to appear and testify on behalf of the United States within that district. When the witnesses appeared but refused to produce certain documentary evidence and to answer certain questions, the United States petitioned the Wisconsin Court for an order directing the witnesses to produce the documents and answer the questions. That Court granted the petition of the United States but allowed the witnesses to appeal to the Supreme Court.

Contemporaneously, the Minnesota Court entered an order directing other witnesses to appear and testify before an examiner on behalf of the United States in the same antitrust action. The Minnesota Court denied the witnesses' application to appeal for the reason that the order was interlocutory and lacked finality, and, upon the witnesses' further refusal to comply, punished them for contempt. An appeal from the contempt judgment was also taken to the Supreme Court. *Nelson* v. *United States*, 201 U. S. 92 (1906).

The *Alexander* and *Nelson* cases were consolidated for argument and it is significant that the appellants urged that

the newly enacted Expediting Act afforded a basis for jurisdiction. See Argument for Plaintiffs in Error, 201 U. S. at pages 106-107.

Since the petitioners in *Nelson* had been found guilty of contempt which was a final judgment, there was no question as to the jurisdiction of the Supreme Court in that case.

However, in *Alexander*, this Court dismissed the appeals for lack of jurisdiction. In so doing, this Court noted that prior to punishment of a witness for failure to comply with an order to testify ". . . the proceedings are interlocutory in the original suit" 201 U. S. at 122. The Court concluded by quoting with approval the opinion of the Minnesota Court in which leave to appeal had been denied, stating:

> "'I have no doubt that a judgment adverse to the witnesses in that proceeding or case will be a final decision and will be subject to review by writ of error, but not by appeal. My opinion is also that the *parties* to the principal suit cannot appeal or obtain a writ of error from that decision.'" (Emphasis added) (201 U. S. at 122)

Hence, the question raised by Lever was decided by this Court adversely to Lever's contentions, over 50 years ago. The same principle was expanded in *Cobbledick* v. *United States*, 309 U. S. 323 (1940), and more recently in *Dibella* v. *United States*, 369 U. S. 121 (1962). Although the latter case dealt specifically with the appealability of an interlocutory order in federal criminal procedure, Justice Frankfurter used the occasion to review the traditional necessity of finality as prerequisite to appellate review in both civil and criminal procedure. At the outset the Justice observed:

> "The general principle of federal appellate jurisdiction derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment." (369 U. S. at 124)

Should the proceedings in the District Court in the Southern District of Ohio be considered a separable action, then jurisdiction of the Supreme Court in this appeal is lacking on two additional grounds. First, the complainant in Ohio was not the United States, and second, the rulings appealed from were not made by the district court in which the antitrust action was brought. Both of the conditions must prevail or the requirements of the Expediting Act are not met.

The Expediting Act confers appellate jurisdiction on this Court only to review final judgments "of *the* district court" which can only refer to a final judgment of the district court *in which the antitrust action is brought by the United States as complainant.* In this case, that district court is, of course, the Southern District of New York, not the Southern District of Ohio.

When a final judgment is reached in the principal action in the New York Court either dismissing the action or granting relief, the matter will be ripe for review and this Court will have exclusive jurisdiction under the Expediting Act. All preliminary matters will be merged in the final judgment and will be subject to review by this Court.

The review of the discovery rulings herein involved may take place in either of two ways:

First, if Appellant, Lever, wishes to offer the testimony of Procter as its witness at the trial, Lever has the processes of the trial court available to it. It is not until the New York Court adheres to the ruling of the District Court in Ohio and Lever loses the principal action that Lever may be said to have been prejudiced. This claimed error may then be assigned in its appeal.

Second, we believe that the rulings of the Ohio District Court would be merged in the final judgment in the New York case and, therefore, receivable on an appeal from that judgment. See *Parr* v. *United States*, 351 U. S. 513, 518-519 (1956).

It is respectfully submitted that the Expediting Act, relied upon by Lever, does not afford a basis of jurisdiction now to review the orders in question and the appeal should, therefore, be dismissed.

The wisdom of confining appellate jurisdiction to final orders is well demonstrated by this very case.

Lever has asserted that it needs information from Procter to establish certain conclusions set out in ¶5 of its "Tentative Statement of Issues" filed in the New York case and also filed as part of the record in this proceeding. (Item 14(e) as listed in Stipulation as to Record.) Without conceding the validity of these conclusions, it is apparent that the conclusions are quite general in nature. As the affidavit of Samuel Benedict (Item #19 as listed in Stipulation as to Record) shows, Procter has submitted a great volume of information to both Lever and The United States, much of which related to Lever's contentions expressed in its "Tentative Statement of Issues."* In addition, Procter offered to supply additional information bearing upon the issues in the New York case. At the deposition of R. S. Runnels, Procter counsel volunteered as follows:

> ". . . This blanket instruction [not to answer certain specific questions] will not cover general information which the witness has concerning Procter & Gamble, its products and its place in the industry, apart from the information contained in the books and records listed on Schedule A of that subpoena.

* The Court below was impressed with the vast amount of information previously produced by Procter under discovery procedures in the principal action to the parties in that action, the United States of America and Lever. The Court in its opinion stated:

> ". . . This conclusion is based on the failure of the defendant to show good cause to require production of the detailed information sought. Much information in the general area of that contemplated by the subpoena has already been made available to the defendant by the use of cross interrogatories and through motion requiring the United States to produce information."

"We do not know how far counsel for Lever wish to go in the area outside of the Schedule A material. That is for them to decide." (Page 14 Deposition of R. S. Runnels; Item 24 as listed in Stipulation as to Record.)

Thereafter, Lever counsel confined their questions to the witness to the record information which had previously been denied to them by the District Court. Lever adjourned the deposition over the protest of counsel for the Justice Department, representing the Plaintiff, United States of America, in the principal action. At that point in the deposition, Procter counsel again reminded Lever that the Procter officials, particularly Mr. Halverstadt and Mr. Hanley, have information "concerning the competition of Procter & Gamble in these products and their place in the industry, all of which may have a bearing upon the issues in this case." (pp. 29-30 Deposition of R. S. Runnels Item 24 as listed in Stipulation as to Record.) Lever was also reminded of the availability of these other witnesses, but Lever persisted in their adjournment of the deposition, (Deposition of R. S. Runnels, pp. 29-32) and thus Lever refused to call the other witnesses and refused to consider whether or not their testimony would be sufficient for Lever's purposes.

Thus, Lever has not exhausted this source of discovery, and has not even begun to explore other sources of proof for its asserted conclusions. Clearly Lever should not be permitted to subject a non-party witness to the time and trouble of an appeal where Lever has not even attempted to obtain equivalent information from accessible sources.

The statement of the Questions Presented in the Jurisdictional Statement of the Appellant, Lever, invites certain inferences, perhaps unintended. These warrant only brief response.

(1) The assignment of the principal action "for all purposes" to Archie O. Dawson, J., by the Chief Judge of District Court for the Southern District of New York was the designation of Judge Dawson to handle

all matters for *that* Court.* The assignment is vis-a-vis other judges of the same District and has no effect outside the District in which the case is pending. The Rules of Civil Procedure give the court issuing the subpoena jurisdiction to quash it, and give the court in which the deposition is being taken (or the court in which the action is pending) the jurisdiction to limit the scope of a deposition. See Infra pp. 5a-7a. The Chief Judge's assignment order could not void the jurisdiction given by the Rules themselves.

(2) Procter, Appellee, is not aware of any instance in which Judge Dawson "required" the evidence in question or "concurred" in the discovery efforts of Appellant, Lever, against Procter *for the specific records* covered by the rulings of the Court below.

The statement of Judge Dawson quoted on p. 8 of the Jurisdictional Statement is not a part of the record in this Court:**

---

* The situation in the District Court of New York, where there are twenty District Judges, was specifically discussed in the Seminar on Protracted Cases for United States Judges at Stanford, California in 1958 (23 F.R.D. 587 at 589).

** If the Court has interest in the quoted statement even though it is not a part of the record in the case, the Court will also be interested in the following excerpts from a pretrial conference held by Judge Dawson in New York on September 19, 1962:

* * *

"THE COURT: What is the data that you want from Procter & Gamble? (Tr. p. 5).

"THE COURT: Why do you have to prove that? Can't you prove that trademarks in the detergent field become valuable as a result of advertising?

"You can get advertising executives to testify probably. I don't see why you need figures if Procter & Gamble think they are confidential." (Tr. p. 6).

"THE COURT: I do not know why the advertising figures or research figures of a particular company, such as Procter & Gamble, are particularly necessary. It seems to me you can establish the fact that what advertising had to be done, you can get a New York advertising agency to testify as to the effect of advertising." (Tr. pp. 7-8).

"THE COURT: I take it that you can get evidence as to the tremendous power in the market and the tremendous amount of expenditures they made without getting their precise figures." (Tr. p. 10).

"THE COURT: What difference does it make in the case what their profits were?

"Suppose you established that they were making tremendous profits without getting the figures, what about that?" (Tr. p. 11).

"THE COURT: I can understand Procter & Gamble is a little suspicious when its competitor comes along and says: 'For this anti-trust case we want to get this confidential information.'" (Tr. p. 27).

Procter is not a party to the action in New York and was not present at the above pretrial conference.

We do not presume to say that Judge Dawson is now in agreement with the Procter position on this confidential data. We hope he will be if the question is presented to him. We cite these transcript references simply to refute the Lever claim that the New York Court "concurred" or "agreed" with the Lever discovery efforts against Procter for these particular figures.

Furthermore, even the statement on p. 8 does not purport to cover the type of records involved in the Court below, i. e., data on an individual brand basis. Judge Dawson would hardly be expected to disregard the distinction drawn by his predecessor, Judge Irving R. Kaufman, in the principal action between data on a brand basis and other data. In a prior proceeding before Judge Kaufman involving non-brand records of Procter, Judge Kaufman was influenced to order their disclosure to Lever because they were *not* on an individual brand basis:

> "... In addition, the sales, production, and profit figures do not contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor." *United States* v. *Lever Brothers Company*, 193 F. Supp. 257.

The conclusion is inevitable that the acceptance of this appeal would frustrate the clear purpose of Congress, expressed in the Expediting Act, and would weaken the trial court's ability to handle protracted cases.

The appeal is not in conformity to statute.

II. The Questions Presented Are Not Substantial.

Lever's assertion that this attempted appeal raises substantial questions of judicial administration is divorced from the reality of this particular case.

The matter is of so little consequence in the principal action that Appellant, Lever, has not seen fit to request a stay of the proceedings in the principal action pending the outcome of this appeal. No application for a stay has been made to this Court, and the record in this case does not disclose an application for a stay to the trial court.

Lever has not been prejudiced in the principal action. Lever has not yet lost the case. In fact the trial has not begun although the case has been pending for over four years. The relevance and admissibility of the evidence in question has not been passed upon by the trial court.

The availability of other processes in the trial court and the provision for direct appeal to this Court from the final judgment makes the case for appealability of an interlocutory order even less impressive in this case than in the usual case.

IN THE ALTERNATIVE, THE MOTION TO AFFIRM SHOULD BE GRANTED.

The order of the District Court granting Procter's motion to quash the subpoena duces tecum directed to R. S. Runnels was clearly not due to any misconceptions as to the grounds for quashing a subpoena duces tecum. In support of its motion, Procter established by affidavits (Items 9 and 18 as listed in Stipulation as to Record) of its officials, that the information called for by the subpoena was highly confidential and that disclosure to Lever, a major competitor both in this country and overseas, would be extremely prejudicial.* Lever denied these conclusions but opposed an oral hearing of the witnesses on this issue. (Item 15 as listed in Stipulation as to Record.) Procter showed the District Court the large amount of information

* Lever states at pages 6 and 15 of the Jurisdictional Statement that the United States recognized the necessity of much of the same data sought by Lever but "failed" to obtain it from Procter. The United States did not try and fail. The United States withdrew its request for brand advertising and promotion expenditures as part of a stipulation approved by the New York court. (Item 10, exhibit 3 as listed in Stipulation as to Record). The United States has consistently taken the position that the information sought by Lever is not necessary to a determination of the issue of the legal effect of Lever's acquisition of "All" from Monsanto. (Letter Loevinger to Judge Peck—Item 11 as listed in Stipulation as to Record).

and records previously submitted to Lever and the United States in the discovery processes of the principal action. (Item 19 as listed in Stipulation as to Record.)

In view of this state of the record, the only fair interpretation of the basis for the District Court's order is that Lever failed to come forward with sufficient evidence showing the necessity of the information demanded from Procter to overcome Procter's showing of confidentiality and prejudice likely to result from disclosure. The same standard has been applied in other cases. See *Hartley Pen Co.* v. *United States District Court*, 287 F. 2d 324 (9 Cir. 1961); *Application of Consumers Union*, 27 F. R. D. 251 (S. D. N. Y. 1961); *United States* v. *Serta Associates, Inc.*, C. C. H. Trade Cases ¶ 70,310 (N. D. Ill. 1961).

The determination of the District Court that the subpoena duces tecum should be quashed and that the same matter not be disclosed by oral deposition was an exercise of the discretion afforded to the District Court by Rule 30 (d) and 45 (b) and (d) of the Federal Rules of Civil Procedure. Manifestly, this discretion has not been abused and, therefore, the decision of the District Court should be affirmed. *Grant* v. *Phoenix Life Ins. Co.*, 121 U. S. 105, 115-116 (1887); *In re Manufacturers Trading Corp.*, 194 F. 2d 948, 953-954 (6 Cir. 1952); cf. *Garland* v. *Torre*, 259 F. 2d 545, 550-551 (2 Cir. 1958) Cert. denied 358 U. S. 910.

CONCLUSION

Since the orders complained of relate only to discovery in a presently pending case, jurisdiction under Section 2 of the Expediting Act is clearly lacking at this time. In the alternative, the orders should be affirmed as being manifestly within the legitimate area of discretion afforded to the District Court by the Federal Rules of Civil Procedure to control pretrial proceedings.

Respectfully submitted,

RICHARD W. BARRETT,
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November 1, 1962

APPENDIX

Opinion of the District Court for the Southern District of Ohio, Western Division

JUDGE'S CHAMBERS
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
CINCINNATI 2

JOHN W. PECK
Judge

July 3, 1962

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
Union Central Building,
Cincinnati 2, Ohio

Re: Civil Action No. 5054

UNITED STATES OF AMERICA
v.
LEVER BROS. CO., ET AL.

Gentlemen:

After a review of the transcript of the arguments of counsel relative to the motion of certain parties named in a subpoena duces tecum in the above action to quash said subpoena, and of the voluminous affidavits and memoranda submitted in connection therewith, it has been concluded that the motion is well taken.

This conclusion is based on the failure of the defendant to show good cause to require production of the detailed information sought. Much information in the general area of that contemplated by the subpoena has already been made available to the defendant by the use of cross interrogatories and through motion requiring the United States

to produce information. In resisting the motion, defendant relies strongly on the learned opinion in *United States v. Lever Bros.*, 193 F. Supp. 254 (S. D. N. Y. 1961), but in contrast to the situation here existing it will be noted that that decision was concerned with figures which did not "contain breakdowns by brand names, the type of data which presumably would be most injurious if improperly used by a competitor."

An entry sustaining the motion to quash subpoena duces tecum and overruling the motion to limit scope of deposition examination for the reason indicated at the time of the oral argument (Transcript, p. 5), endorsed by counsel for the parties concerned, may be presented.

Yours truly,

JOHN W. PECK

cc: PAXTON & SEASONGOOD
MR. JAMES J. COYLE

Order of the District Court for the Southern District of Ohio, Western Division, Dated July 13, 1962

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

UNITED STATES OF AMERICA, *Plaintiff*

v.

LEVER BROTHERS, ET AL., *Defendants*

ORDER

This cause came on to be heard on the motions of The Procter & Gamble Company, Richard S. Runnels, Albert

N. Halyerstadt and John W. Hanley to quash the subpoena duces tecum addressed to Richard S. Runnels and to limit the scope of deposition examination of Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, pursuant to subpoenas heretofore issued to appear and testify on behalf of Lever Brothers. The Court, having heard argument of counsel and having considered the affidavits and memoranda submitted by the parties and being fully advised in the premises, finds that the motion to quash the subpoena duces tecum to Richard S. Runnels should be, and hereby is, sustained, and it is ordered that the said subpoena duces tecum be quashed. The Court further finds that the motion to limit the scope of deposition examination is premature, said depositions not having been commenced, and it is therefore ordered that the motion to limit the scope of deposition examination is overruled.

s JOHN W. PECK (J)
United States District Judge

DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
s RICHARD BARRETT
Attorneys for The Procter & Gamble Company.
R. S. Runnels, A. N. Halverstadt and
J. W. Hanley.

No objection as to form

s PAXTON & SEASONGOOD
Attorneys for Lever Brothers

Dated: July 13, 1962.

Order of the District Court for the Southern District of Ohio, Western Division, Dated July 24, 1962

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 5054

In the Matter of:

UNITED STATES OF AMERICA, *Plaintiff*

v.

LEVER BROTHERS, ET AL., *Defendants*

Order

This cause came on to be heard on the motion of Lever Brothers Company for an order to compel Richard S. Runnels, Albert N. Halverstadt and John W. Hanley, witnesses subpoenaed to testify on behalf of Lever Brothers Company, to answer certain questions propounded on oral deposition examination which the witnesses declined to answer on the instruction of counsel. It appearing that the questions call for the same information as contained in the books and records of The Procter & Gamble Company identified in Schedule "A" to the subpoena duces tecum addressed to Runnels, which the Court ordered quashed in July 13, 1962,

It is Ordered that the motion should be, and hereby is, denied.

/s/ JOHN W. PECK (J)
United States District Judge

/s/ RICHARD BARRETT
DINSMORE, SHOHL, BARRETT, COATES & DEUPREE,
Attorneys for The Procter & Gamble Company,
R. S. Runnels, A. N. Halverstadt and
J. W. Hanley.

No objection as to form
/s/ ABE KRASH
Attorneys for Lever Brothers Company
Dated: July 24, 1962.

STATUTES AND RULES INVOLVED

The Expediting Act, 15 U. S. C. § 29:

§ 29. Appeals to Supreme Court

In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court. Feb. 11, 1903, c. 544, § 2, 32 Stat. 823; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 9, 1944, c. 239, 58 Stat. 272; June 25, 1948, c. 646, § 17, 62 Stat. 989.

Section 7 of the Clayton Act, 15 U. S. C. § 18:

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

Rule 30, Federal Rules of Civil Procedure:

Rule 30. Depositions Upon Oral Examination

* * * * * *

(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or

that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * * *

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Rule 45, Federal Rules of Civil Procedure:

Rule 45. Subpoena

* * * * *

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things. As amended Dec. 27, 1946, effective March 19, 1948.

* * * * *

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the person named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 487

LEVER BROTHERS COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 565, MISC.

LEVER BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION OF THE UNITED STATES TO DISMISS APPEAL IN NO. 487

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR CERTIORARI IN NO. 565, MISC.

In the two captioned proceedings, Lever Brothers is seeking by alternative means to obtain review of

the same two discovery orders of the district court, one quashing a subpoena *duces tecum* and the other denying a motion to compel witnesses to answer questions propounded at a deposition upon oral examination. Pursuant to Rule 16, paragraph 1(a) of the Revised Rules of this Court, the United States moves that the appeal in No. 487 be dismissed. In No. 565, Misc., the United States files this brief in opposition to petitioner's motion for leave to file a petition for writ of common law certiorari, pursuant to Rule 31.

OPINION BELOW

The two orders of the district court, and the court's opinion letter accompanying the order quashing the subpoena are not reported. They are reproduced in the appendix to the jurisdictional statement in No. 487.

JURISDICTION

The orders of which review is sought were entered by the District Court for the Southern District of Ohio on July 13, 1962, and July 24, 1962. On August 6, 1962, Lever Brothers filed a notice of appeal to this Court, and on October 4, 1962, Lever Brothers filed its jurisdictional statement in No. 487, asserting that the jurisdiction of this Court is founded on Section 2 of the Expediting Act, 15 U.S.C. 29. Simultaneously, on October 4, 1962, Lever Brothers filed a motion for leave to file a petition for certiorari in No. 565, Misc., invoking this Court's jurisdiction to issue extraordinary writs under 28 U.S.C. 1651.

QUESTIONS PRESENTED

1. In No. 487, the question presented by this motion to dismiss is whether a pretrial order in a civil antitrust suit, limiting discovery against third persons, when entered by a district court other than the court in which the action is pending, is a "final judgment" directly appealable to this Court under Section 2 of the Expediting Act.

2. In No. 565, Misc., the question presented is, assuming that appeal will not lie, whether an extraordinary writ of common law certiorari should be issued by this Court to review the interlocutory discovery orders in this case.

STATUTES INVOLVED

Section 2 of the Expediting Act, 15 U.S.C. 29, provides in pertinent part:

> In every civil action brought in any district court of the United States under any of said Acts [including the Clayton Act, see 15 U.S.C. 28], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

28 U.S.C. 1651(a) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

The antitrust suit out of which the proceedings in the District Court for the Southern District of

Ohio arose is a civil action by the United States against Lever Brothers Company and the Monsanto Chemical Company, commenced in the Southern District of New York, on July 8, 1958. The complaint alleges that Lever Brothers' acquisition from Monsanto of all property rights in a synthetic detergent, ALL, violated Section 7 of the Clayton Act, 15 U.S.C. 18.

Since the filing of the complaint in New York, the parties have made much use of pretrial discovery under the Federal Rules of Civil Procedure. Much of this discovery was directed to Procter & Gamble Company and its officers because that company is an important competitor of Lever Brothers in the detergent field.[1]

On May 1, 1962, Lever, having served three of Procter & Gamble's employees with a notice of the taking of their deposition, obtained subpoenas from the Clerk of the United States District Court for the Southern District of Ohio to compel the attendance of the three Procter employees as witnesses, pursuant

[1] The permissible scope of discovery against Procter & Gamble Company is the subject of a reported decision by the court in which the government's action is pending, *United States* v. *Lever Brothers Company*, 193 F. Supp. 254 (S.D. N.Y.). The background of that opinion is that, after the government obtained information from Procter pursuant to written interrogatories, Lever sought to obtain it from the government and Procter thereupon moved for return of the material or an order allowing disclosure only to Lever counsel, and prohibiting disclosure to Lever. The district court held that Lever was entitled to full discovery subject to a protective order that the information should not be disclosed to Lever personnel except to the extent necessary to prepare for and assist in the trial of the case.

to Rule 45(d)(1) of the Federal Rules of Civil Procedure. In addition, a subpoena *duces tecum* was obtained directing one of the employees to bring certain records of Procter & Gamble Company with him to the deposition proceeding.

Procter & Gamble Company and the individual deponents asked the District Court for the Southern District of Ohio to quash the subpoena *duces tecum* under Rule 45(b) and to limit the scope of deposition examination under Rule 30(d). They asserted that Lever Brothers was requesting valuable and confidential trade secrets and argued that disclosure of these trade secrets to a competitor was not required by the exigencies of the defense of the antitrust suit.

Extensive affidavits and memoranda were filed by Procter and Lever regarding these motions. The United States limited itself to asserting the necessity for prompt action by the court below and reserved its right to object to the introduction at the trial of any material obtained in the discovery proceeding. On July 13, 1962, the district court granted the motion to quash the subpoena *duces tecum* and overruled the motion to limit the scope of the deposition examination. Thereafter Lever commenced oral examination of the deponents and sought to elicit substantially the same information which was contained in the documents called for in the quashed subpoena *duces tecum*. On advice of counsel, the deponents refused to answer and Lever sought an order from the District Court for the Southern District of Ohio pursuant to Rule 37(a) to compel the deponents

to answer the question propounded by Lever. On July 24, 1962, the district court denied this motion (J.S. App. 23–24).

Lever filed a notice of appeal to this Court on August 6, 1962, and filed a jurisdictional statement and a motion for leave to file a petition for certiorari on October 4, 1962. A notice of appeal to the Sixth Circuit Court of Appeals was filed August 10, 1962.[2]

ARGUMENT

The pretrial discovery orders of which review is sought are interlocutory steps in an antitrust suit now pending in the Southern District of New York, where trial has been scheduled for January 1963. Allowance of such an interlocutory appeal would interfere with the expeditious prosecution of antitrust cases and is expressly barred by the Expediting Act. Although the proceeding below took place in another district, Lever Brothers will be able to obtain review of the present issue upon appeal from the final judgment in the antitrust action. Moreover, this is not an appropriate case for interlocutory review by extraordinary writ.

A. In No. 487, the appeal should be dismissed for lack of jurisdiction in this Court.

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[2] *In the Matter of Notice of Deposition of the Procter & Gamble Company; United States of America* v. *Lever Brothers Co. & Monsanto Chemical Co.*, No. 15,140 (C.A. 6, 1962). The United States and Procter & Gamble Company have filed motions to dismiss Lever Brothers' appeal to the court of appeals. The court of appeals has not yet ruled on the pending motions and Lever Brothers has asked that decision be delayed until this Court rules on the present applications.

Section 2 of the Expediting Act, 15 U.S.C. 29, authorizes appeal to this Court only from "the final judgment" of the district court in civil antitrust cases in which the United States is complainant. As this Court stated, the purpose of this statute is "to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act". Not only are the courts of appeals bypassed, but also "Congress limited the right of review to an appeal from the decree which disposed of all matters * * * *and it precluded the possibility of an appeal to either court from an interlocutory decree.*" *United States* v. *California Canneries*, 279 U.S. 553, 558. [Emphasis added.] To the same effect are *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305, fn. 9; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *National Association of Real Estate Boards* v. *United States*, 176 F. 2d 631 (C.A.D.C.).[3]

The orders below limited discovery by one of the parties to a pending antitrust suit against nonparty witnesses. Such rulings relating to pretrial discovery are typical nonappealable interlocutory orders. See 4 Moore, *Federal Practice* ¶ 26.37[1]. This Court has held that motions for an application for a subpoena *duces tecum* are part of "the general subject of the litigation" and that therefore all "orders made upon

[3] In all cases, "Finality as a condition of review is an historic characteristic of federal appellate procedure". *Cobbledick* v. *United States*, 309 U.S. 323, 324; *DiBella* v. *United States*, 369 U.S. 121, 126. But the policy is even stronger in antitrust cases under the Expediting Act. Thus, interlocutory orders in ordinary civil cases can now be made appealable by a certification; not so in cases under the Expediting Act.

such applications" are unappealable. *Cogen* v. *United States*, 278 U.S. 221, 223, 224.[4]

The fact that the instant motions were acted on by a district court other than the one in which the trial will ultimately take place does not alter their interlocutory nature. In *Alexander* v. *United States*, 201 U.S. 117, this Court held nonappealable the denial of a motion to quash a subpoena in a government antitrust case, even though the order was entered by a court other than that in which the trial of the case would eventually occur.[5] In many cases, particularly in the antitrust field, the parties often take depositions in other districts. If each such order were appealable, the Congressional policy against piecemeal appeals would be easily flouted.

Clearly, Lever Brothers will be able to obtain appellate review of the present issue upon appeal from an adverse final judgment in the antitrust action in the Southern District of New York. As a party to

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[4] See also *Cobbledick* v. *United States*, 309 U.S. 323 (denial of motion to quash grand jury subpoena not appealable); *Alexander* v. *United States*, 201 U.S. 117 (denial of motion to quash pretrial subpoena in antitrust case not appealable). *United States* v. *Tinkoff*, 153 F. 2d 106 (C.A. 7), certiorari denied, 329 U.S. 740 (denial of application for subpoena not appealable).

[5] Accord, *Palmer* v. *Fisher*, 228 F. 2d 603 (C.A. 7), certiorari denied, 351 U.S. 965 (grant of motion to quash subpoena); *Robinson* v. *Bankers Life & Casualty Co.*, 226 F. 2d 834 (C.A. 6), (denial of motion); *National Nut Co. of California* v. *Kelling Nut Co.*, 134 F. 2d 532 (C.A. 7) (denial of motion). The First Circuit recently declined to follow *Palmer* v. *Fisher*, on grounds not pertinent in this case, *infra*, pp. 10–11.

a government antitrust suit, Lever may take advantage of the nationwide subpoena authority in 15 U.S.C. 32 and obtain subpoenas from the trial court in New York compelling the attendance at trial of the Procter & Gamble Co. employees in Ohio here involved, seeking to compel testimony as to the same matters.[6] In addition, Lever is not foreclosed from attempting to obtain the same information in New York, by use of written interrogatories to the company under Rule 31. This was the procedure heretofore utilized by the government, n. 1, *supra*. In the circumstances, there is no basis for an appeal at this interlocutory stage. Cf. *DiBella* v. *United States*, 369 U.S. 121, 132–133.[7]

None of the cases cited by Lever Brothers (Pet. 5) in support of the Court's jurisdiction on appeal is

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[6] Lever counsel has already indicated, in the course of pretrial conferences in the Southern District of New York, that it will apply to that court for trial subpoenas to the Procter witnesses, if it is unsuccessful in the present proceeding. Transcript of pretrial conference, September 16, 1962, pp. 25-26. In that connection, Judge Dawson in New York indicated that Lever might be able to obtain sufficient economic evidence for its defense of the case, without the specific statistical data sought from Procter & Gamble (*id.* at 26).

[7] In *DiBella* v. *United States*, 369 U.S. at 132–133, this Court held that an order granting or denying a pre-indictment motion to suppress evidence in a criminal case was interlocutory and not appealable, even when it is made in a district other than that in which the trial will be held. The Court noted that such a pretrial order may be "tentative", and appeal would transgress the policy against "piecemeal adjudication" (p. 132).

apposite. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–547, the Court held appealable a claim "separable from, and collateral to, the rights asserted in the action * * * which is not an ingredient of the cause of action and does not require consideration with it."[7] Never has it been suggested, however, that pretrial discovery orders can be "independent" of the merits; such orders are clearly an aspect of "the general subject of the litigation" (*Cogen* v. *United States*, 278 U.S. at 223).[8] In *Horizons Titanium Corp.* v. *Norton Co.*, 290 F. 2d 421 (C.A. 1), the First Circuit took jurisdiction of an appeal from an order quashing subpoenas secured in the Massachusetts district court by a party to an action pending in the District of Columbia, on the ground that the issue could not be brought into the main case for eventual review. However that may be in ordinary civil litigation, we have already shown that, in this case, Lever Brothers can assure such review.[9]

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[7] If the present orders were deemed "separable" decrees in the main case, then, as we said in our motion to dismiss before the Court of Appeals for the Sixth Circuit (n. 2, *supra*), the appeal would be here and not to that court.

[8] Another case cited by Lever, *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688–689, was an application of *Cohen* to uphold review of an order vacating an attachment of a vessel. Once the vessel departed, the attachment could not be restored, and, therefore, the provisional relief was ruled severable and appealable. Similarly, the Seventh Circuit in *Palmer* v. *Fisher*, 228 F. 2d 603, 607, *supra*, fn. 5, although holding nonappealable an order quashing a subpoena, did review an order directing physical destruction of a deposition.

[9] Lever's reliance on *Horizons* is inconsistent with its invocation of this Court's jurisdiction. *Horizons* suggests that the discovery proceeding in a court other than the trial district may

B. In No. 565, Misc., petitioner's motion for leave to file petition for writ of certiorari under 28 U.S.C. 1651 should be denied.

The common law writ of certiorari sought by petitioner has historically been used to enforce jurisdictional limitations upon inferior courts; it "may not be used as a substitute for an authorized appeal", nor may it be used as a basis for interlocutory appeal "in the face of the plain indication of the legislative purpose to avoid piecemeal reviews". *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202–203; *United States* v. *Beatty*, 232 U.S. 463, 467;

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be considered "plenary", when decided adverse to the party. If so, it would not be a civil antitrust action in which the United States is complainant for Expediting Act purposes, and appeal would lie only to the court of appeals. We believe that the proceedings below was clearly not plenary but an interlocutory step in the pending antitrust case.

As a rule for nonantitrust cases, *Horizons* is contrary to *Palmer* v. *Fisher*, cited *supra*, fn. 5. The First Circuit distinguished *denial* of a motion to quash a subpoena, which it agreed would not be appealable, on the ground that a witness has an alternative means of obtaining a review of an adverse ruling, by forcing a contempt proceeding. However, contrary to that court's belief that an appeal must be available sooner or later from every order in civil litigation, appeals are a matter of Congressional grace (*Cobbledick* v. *United States*, 309 U.S. 323, 325), and there may well be issues which cannot be tested by appeal, because of the requirement of finality, and for which the extraordinary writs constitute the only remedy for abuse of discretion. See 4 Moore, *Federal Practice* ¶26.37 [4], [7] discussing review by prefogative writ of discovery orders; see also *Ex parte Blaski*, 245 F. 2d 737 (C.A. 5), certiorari denied, 355 U.S. 872 (review of transfer of cases under 28 U.S.C. 1404(a)).

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21, 26; see also Rule 30, Revised Rules of this Court.

The orders below are routine rulings on pretrial discovery which are not appealable; *a fortiori* there is no basis for the issuance of an extraordinary writ. Although labelled "extraordinary circumstances" by the petitioner, the issues of which it seeks review under 28 U.S.C. 1651 are (Pet. 7-9): (a) the propriety of a decision on pretrial discovery matters by a court other than the trial court—a procedure clearly contemplated by the Federal Rules of Civil Procedure[10] and (b) the correctness of the decisions rendered.

The contrast between the factual situation here and those in the three cases which are relied upon by the petition (p. 7) strongly militates against the exercise of this Court's discretionary jurisdiction under 28 U.S.C. 1651. Thus, in *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, the issue was

[10] Rule 45(d)(1), Federal Rules of Civil Procedure, authorizes the clerk of the district court in which a deposition is to be taken to issue subpoenas in aid of the deposition. Any issues regarding the subpoenas are determined by the court which issued them and there is no basis for Lever's suggestion that the controversy regarding the discovery orders must be turned over to the New York District Court for decision as a result of the designation of one judge of that court, "for all purposes" in this antitrust case. Furthermore, the order denying the motion to compel deponents to answer was sought by Lever Brothers in the Ohio District Court under Rule 37(a) of the Federal Rules of Civil Procedure. The rule specifies that the motion must be made "to the court in the district where the deposition is taken."

the jurisdiction of a district court to issue a preliminary injunction in a Sherman Act proceeding which had the effect of sequestering property worth many hundreds of thousands of dollars. The order concerned "a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order * * *" 325 U.S. 212, 217. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, and *Far East Conference* v. *United States*, 342 U.S. 570, presented grave questions regarding the jurisdiction of district courts in Sherman Act cases *vis-a-vis* administrative agencies who assertedly had primary jurisdiction of the issues before the court.

This case presents no issue of similar moment. Petitioner, of course, concedes that the Ohio district court had jurisdiction of the pretrial discovery proceedings but argues that supervision of "the comity owing by one court to another" requires the issuance of the extraordinary writ (Pet. 9). But the fact is that Lever Brothers may yet obtain the material sought in discovery or at trial (see p. 9, *supra*). And of course a final decision in Lever's favor on the merits of the case will render the issue now before this Court moot. An extraordinary writ under 28 U.S.C. 1651 cannot "be availed of to correct a mere error in the exercise of conceded judicial power" (*DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217). See also *Roche* v. *Evap-*

orated Milk Ass'n, supra; United States v. Beatty, supra. The issues raised by the petition for certiorari do not warrant departure from the Expediting Act's provision that appeal to this Court is authorized only from a "final judgment".

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal in No. 487 be dismissed and that the motion for leave to file a petition for certiorari in No. 565, Misc., be denied.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
MICHAEL I. MILLER,
Attorneys.

NOVEMBER 1962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 187; No. 565, Misc.

LEVER BROTHERS COMPANY, *Appellant,*

v.

UNITED STATES, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND TO AFFIRM

LEVER BROTHERS COMPANY, *Petitioner,*

v.

UNITED STATES, et al., *Respondents.*

ON MOTIONS FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 487; No. 565, Misc.

LEVER BROTHERS COMPANY, *Appellant*,

v.

UNITED STATES, et al., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS AND TO AFFIRM

LEVER BROTHERS COMPANY, *Petitioner*,

v.

UNITED STATES, et al., *Respondents*.

ON MOTIONS FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

PETITIONER'S REPLY BRIEF

I. THIS COURT HAS JURISDICTION OVER THE APPEAL IN No. 487*

A. *The Necessity for Review of the Orders.*—The Government's motion to dismiss the appeal in No. 487 and its opposition to our alternative motion for leave to file a petition for common law writ of certiorari in No. 565, Misc., do not undertake to defend the merits of the orders entered in the Ohio District Court.[1] In view of our extensive discussion of the merits of those orders in our Jurisdictional Statement, we shall not repeat the argument that the orders of the Ohio Court are plainly erroneous and raise substantial and important questions in connection with the judicial administration of the antitrust laws and the Federal Rules of Civil Procedure. Unless on review those orders are reversed, the district court in New York will be deprived of data essential to informed adjudication of this important antitrust case, and Lever Brothers will have been denied information vital to its defense.

B. *The Orders Under Review Are Final Judgments.*—The only jurisdictional objection to the entertainment of this appeal by this Court pressed by the Government is its argument that the judgments of the Ohio District Court are lacking in finality. As such, the Government contends they cannot be reviewed

* This brief is submitted by Lever Brothers Company in opposition to a motion by the United States to dismiss the appeal in No. 487, and in opposition to a motion by the Procter & Gamble Company, et al. to dismiss or affirm. Lever Brothers also submits herewith its reply to the oppositions interposed to Lever Brothers' motion for leave to file a petition for a common law writ of certiorari in No. 565, Misc.

[1] The Government's motion, significantly, is captioned simply a motion to dismiss, and not one to affirm.

under Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29, which limits appellate review to "final" judgments. We submit that the orders involved are final, and hence this objection is utterly without merit.

1. In considering the finality issue, it is essential to bear in mind all of the special characteristics of the orders which Lever Brothers seeks to have reviewed:

(i) The orders were entered by a court other than the court in which the action on the merits is pending, i.e., the case involves so-called "foreign" discovery proceedings.

(ii) The orders involve a party to the action on the merits (Lever Brothers) and third persons who are not parties (Procter & Gamble, et al.).

(iii) The orders entered by the Ohio district court *denied* a discovery application; the court below *granted* a motion to quash and it *refused* to require answers to questions propounded at an oral deposition.

(iv) There has been a final disposition of the proceeding between Lever Brothers and Procter & Gamble in the Ohio district court. Lever Brothers can do nothing further in that court to secure the required information.

In view of the foregoing facts, the bulk of the cases cited by the Government are totally irrelevant to the resolution of the special jurisdictional question presented here. Thus, cases holding not final and unappealable ordinary orders granting or denying discovery, involving parties only, and entered by the

court in which the action will be tried on the merits, are completely beside the point.[2] The correctness of such orders can clearly be reviewed on appeal from the judgment eventually rendered by the court in the cause, and, accordingly, such orders are purely interlocutory. Further, cases involving orders by a foreign court *granting* discovery against a nonparty are inapposite; such orders are deemed nonappealable on the ground that there is no final order until the witness is found in contempt for refusal to comply with the discovery order.[3]

2. An entirely different situation is presented, however, by an order entered in a *foreign* discovery proceeding, involving a *nonparty*, *denying* discovery such as the orders under review herein. If the for-

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[2] For such beside-the-point cases, see *Cogen* v. *United States*, 278 U.S. 221 (1939); *United States* v. *Tinkoff*, 153 F. 2d 106 (7th Cir.), *cert. denied*, 329 U.S. 740 (1946), cited by the Government, Motion, p. 8. Also irrelevant are the cases dealing with interlocutory orders involving other than discovery matters, entered by the court in which the action is pending. See, e.g., *United States* v. *California Co-Operative Canneries*, 279 U.S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137 (1944), cited by the Government, Motion, p. 7.

DiBella v. *United States*, 369 U.S. 121 (1962), relied upon by the government, and *Koenig* v. *United States*, *ibid.*, involved orders granting or denying motions to suppress evidence in criminal cases, and are likewise inapposite. Moreover, unlike the present case, *DiBella* and *Koenig* involved only parties to the action on the merits.

[3] This principle is the basis of *Alexander* v. *United States*, 201 U.S. 117 (1906); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Robinson* v. *Bankers Life & Casualty Co.*, 226 F. 2d 834 (6th Cir. 1955); and *National Nut Co.* v. *Kelling Nut Co.*, 134 F. 2d 532 (7th Cir. 1943), cited by the Government, Motion, p. 8, and by Procter & Gamble, Motion, pp. 6-7. On the other hand, it is held that when a non-party witness declines to answer and is held in contempt, a final judgment is presented, and an appeal lies. *Nelson* v. *United States*, 201 U.S. 92 (1906). The present case involves an order *granting* a motion to quash a subpoena; in a case of this kind, no further proceedings can ensue, as they may in the case of a denial of such a motion.

eign court's order denying discovery is deemed to be non-appealable, the party adversely affected will be entirely denied appellate review of a highly prejudicial order. In terms of the present case, the erroneous curtailment of Lever Brothers' discovery rights by the District Court for the Southern District of Ohio if unappealable now, will not be grounds for reversing a judgment later entered by the District Court for the Southern District of New York; and this without regard to the prejudice suffered by Lever Brothers in the trial of the action. No case has been cited which holds that an error of this nature by one district court can be imputed to the judgment of another district court so as to render the latter court's judgment erroneous and subject to reversal on appeal. Indeed, there is learned authority that it cannot be so imputed.[4]

The more carefully considered opinion in the Courts of Appeals dealing with the appealability of a foreign discovery order comparable to the orders in the present case is *Horizons Titanium Corp. v. Norton Co.*, 290 F.2d 421 (1st Cir. 1961).[5] There it was held that an order quashing a subpoena *duces tecum*, addressed to a third party, entered by a district court other than the district court in which the action on

[4] *Horizons Titanium Corp. v. Norton Co.*, 290 F. 2d 421, 422-423 (1st Cir. 1961).

[5] Contrary to *Horizons Titanium* is the earlier case of *Palmer v. Fisher*, 228 F. 2d 603 (7th Cir. 1956), *cert. denied*, 351 U.S. 965 (1956). The *Palmer* decision was shown by the Court of Appeals in *Horizons Titanium* to rest upon faulty analysis and of course was not followed (290 F. 2d at 422-423). The *Horizons Titanium* case and the *Palmer* case are the only two cases found which discuss the question of whether an order denying foreign discovery is a final judgment for purposes of appeal under appeal statutes such as §1291 of the Judicial Code, or §2 of the Expediting Act.

the merits is pending, is a "final" appealable judgment under the provisions of 28 U.S.C. 1291, the appeal statute relating to ordinary civil litigation, which, like the Expediting Act, demands a "final" judgment. In *Horizons Titanium*, a plaintiff in a proceeding pending in the District Court for the District of Columbia sought to subpoena records from a third party in Massachusetts. The District Court for Massachusetts granted a motion to quash the subpoena. The Court of Appeals for the First Circuit denied a motion to dismiss the appeal and held the order appealable. The Court pointed out that (290 F.2d at 423):

> "The appealability of orders cannot be decided by rote. It is not the fact that the order below dealt with a motion to quash a subpoena duces tecum that is controlling, or, perhaps, not even that the motion was granted. Nor does it make any difference that the court's action was not a final judgment in the usual sense. What is critical is whether the party unsuccessfully seeking the subpoena has any other means of obtaining review. . . . *Here the order of the district court made a final disposition of the only proceedings in its district growing out of a particular controversy, and the only proceeding pending between these particular parties anywhere.* It cannot be said to lack finality either because it was ancillary to some other proceeding in another district, or because before some other district judge, or on some other set of facts, a different decision might have been made. The motion to dismiss for lack of jurisdiction must be denied." (Emphasis supplied).

The government attempts to distinguish *Horizons Titanium* on the theory that, under the Expediting Act, Lever Brothers can secure review in this Court

of the Ohio court's ruling in an appeal from a judgment on the merits by the New York court (Gov't Motion, p. 10). It suffices to say that no case decided under the Expediting Act holds that a foreign court's order denying discovery is subject to review on appeal from a judgment on the merits by the district court in which the action is tried. Indeed, the Government's reliance on such a novel premise to distinguish the leading precedent underscores the necessity for review here.

Procter & Gamble (though, significantly, not the Government) argues that "we believe that the rulings of the Ohio District Court would be merged in the final judgment in the New York case and, therefore, reviewable [sic] on appeal from that judgment." (Procter Motion, p. 8).[2] Since Procter will not be a party to the judgment of the New York Court, it apparently feels a certain freedom to make this concession which the Government does not.

In any event, there is no basis for Procter's belief. *Parr v. United States*, 351 U.S. 513 (1956), upon which Procter relies, is certainly not authority for the point. In *Parr*, the Government obtained an indictment in one district; on defendant's motion, the case was transferred to another division in the same district. Thereafter, the Government obtained a new indictment in a second district and dismissed the first indictment. The defendant sought review of this dismissal on grounds that the Federal Rules of Criminal Procedure prohibited his prosecution in the second district. This Court held that the defendant's contention would be available to him on appeal from a judgment of conviction by the court in the second district, and

therefore, an appeal from the first dismissal would not lie. In other words, the defendant's contention in *Parr* was held to be one, which, if correct, would totally invalidate the proceedings in the second district and alone render them prone to reversal on appeal. It was in essence a jurisdictional objection. But there is no authority that an erroneous ruling on a foreign discovery motion, such as the orders presently in issue, infects the trial on the merits with such error. Procter's contention, then, is a sheer begging of the question here presented.

3. Viewed from another perspective, Lever Brothers is entitled to immediate review of the Ohio District Court's orders under the "offshoot rule" of *Forgay v. Conrad*, 47 U.S. 201 (1848), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950). Orders such as those entered by the district court are deemed immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action [on the merits], too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546.

There is no further action which Lever Brothers can take in the Ohio district court to secure the data.[6]

[6] Procter & Gamble does make some suggestion that Lever Brothers has alternate sources of proof. (Motion, pp. 9-10). The record is absolutely clear that none of them relates to the vital information in question here. What Lever Brothers is seeking are figures for advertising and promotional expenditures, research expenditures, and profit, by brand, for the Procter detergent brands iden-

The proceeding in the Cincinnati court is complete in itself. The present controversy "is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW v. Johnson*, 326 U.S. 120 at 126 (1945).

4. The government apparently recognizes that the discovery question must be raised in the district court in New York before that court's judgment as to that issue could be cited as erroneous on appeal (Motion to Dismiss, pp. 8-9). The Government suggests two methods by which it claims Lever Brothers may be able to obtain the information through use of the New York court's processes. As a matter of law, the argument is irrelevant with respect to finality. To quote Judge Ahrlich in *Horizons Titanium Corp., supra* (290 F.2d at 423):

"We can hardly think that an order of a district

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ruled by the Government as within the relevant lines of commerce. This is what the subpoena *duces tecum* quashed by the court below called for. Procter's counsel instructed all his witnesses not to give, by way of oral answer, any of the information in question. Trans. RS Runnels Dep. pp. 14-15, July 19, 1962. The court below denied a Lever motion to compel those answers. Procter had advised the court below that the "information is not available from any source outside the company" and that it was "distributed within the company to only a very few persons in the management." (RS Runnels Affidavit, Par. 5, May 15, 1962). Indeed, the burden of Procter's objection to Lever's motion for discovery was that the information called for involved "trade secrets."

The remarks of Procter's attorney quoted (Procter Motion, pp. 9-10) simply mean that Lever may be able to get extraneous information other than that which has an obvious and vital bearing on its case and which is sought here. It is no answer to a request for information "A" to say that information "Z" will be given instead. Nor is it an answer to say that information "X" and "Y" have previously been given to the Government. (See Procter Motion, p. 9; Gov't Motion, p. 1).

In any event, the Procter contention is unrelated to the question of appealability.

> court quashing a subpoena lacks finality simply because the movant remains free to start all over again . . . Assuming . . . that a second application would not be precluded by principles of res judicata . . . it would be a singular rule that a decision on certain facts and circumstances lacks the finality necessary for an appeal simply because appellant could start over again by alleging other facts and circumstances which might produce a different result."

But in any event, as we discuss below, neither of the alternative courses suggested by the government is an effective means of obtaining the required information from Procter & Gamble.

(1) The government suggests that under the special statute (15 U.S.C. 23) which makes *trial* (though not *discovery*) subpoenas running throughout the country available to the parties in a governing civil antitrust suit at the discretion of the judge, Lever Brothers might obtain a subpoena *duces tecum* from the New York District Court compelling attendance at the trial of the Procter & Gamble executives in Ohio here involved. As a substitute for discovery, the suggestion is a fantastic one. If the government is at all serious in its suggestion, it may be that a new way has been found to deal with discovery problems in the so-called "big case"—eliminate discovery altogether and proceed at once from pleadings to trial.

The right to pre-trial discovery is entirely different from the right to call witnesses at trial. Discovery is a means of preparing for trial.[7] In discovery pro-

[7] Cf. the Antitrust Civil Process Act, 76 Stat. 548, passed September 19, 1962 in response to the disapproval voiced by the Judicial Conference and others to the bringing of an antitrust

ceedings, "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence," Fed. R. Civ. P. 26(b). In short, the scope of pretrial discovery is much more comprehensive than the right to subpoena trial witnesses under 15 U.S.C. 23. Cf. *United States v. E. I. DuPont De Nemours*, 14 F.R.D. 341 (N.D. Ill. 1953); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 27 F.R.D. 513 (S.D. N.Y. 1961).

The government's suggestion is totally unrealistic. The data involved are primarily statistical in nature and must be analyzed by accountants and other specialists. To defer discovery until trial would result in disruption of the trial and seriously handicap both the court and Lever Brothers' efforts to present the data.

(ii) Alternatively, the government suggests that Lever Brothers might obtain the required data by taking depositions upon written interrogatories under little-used Rule 31.[8] (Gov't Motion, p. 9). It is not clear from the government's motion whether it con-

suit by the United States "*without adequate factual preparation.*" H.R. Rep. No. 1286, 87th Cong. 2d Sess., 4-5 (1962). Significantly, Section 5(d) of the Act recognizes that court orders entered in the course of the newly permitted discovery proceedings could be final and appealable.

[8] The annotations to Rule 31 in *United States Code Annotated* indicate the paucity of rulings under that rule, and, inferentially, the disuse of that rule by the bar. Our objection to the Rule 31 procedure suggested by the Government as an alternative to the discovery denied below is based, however, not simply upon the cumbersome nature of Rule 31, particularly when used with a hostile deponent (See 4 Moore, *Federal Practice*, ¶31.02 (2d ed. 1950)), but upon the fact that there is no support for the Government's suggestion that the information in question here could be secured by Rule 31 proceedings.

templates that Lever Brothers should address written interrogatories to Procter executives in Cincinnati or to some subordinate Procter employee in New York. The government assumes that in either event Procter & Gamble would necessarily have to petition the trial court in New York for relief. The government's argument will not survive scrutiny.

The required data are controlled, according to Procter & Gamble, by "a very few persons in the management" at Procter's main offices in Cincinnati.[9] Even if some subordinate Procter employee in New York could be brought within the process of the New York court he would, in all probability, simply attend the place noticed for the taking of the deposition, state that the records were not in his control, and express his unfeigned ignorance when the interrogatories were read to him for his answers. The government cites no precedent for the notion that written interrogatories under Rule 31 may be addressed to a corporate employee, who is not a party, which require him to assemble corporate statistics in the control of corporate executives located in another district, prepare himself for examination with them, and produce them at the deposition. Unlike written interrogatories to a *party* under Rule 33, Fed. R. Civ. P., a deposition upon written interrogatories addressed to a non-party witness under Rule 31 calls only for the information personally known to the witness.[10] The

[9] R. S. Rinnells Affidavit, Par. 5, *In the Matter of United States v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 5054, S.D. O., May 15, 1962.

[10] The Government apparently is confusing the Rule 31 deposition procedure with the procedure established under Rule 33 for the service of interrogatories *upon a party*. There is no provision in Rule 31 corresponding to that of Rule 33, which provides

suggestion that Lever Brothers invoke the subpoena powers of the New York court is, therefore, not a helpful one.

The alternative proposed solution—written interrogatories served upon a Procter executive in Cincinnati—would be equally futile. If the interrogatories were accompanied by a subpoena, which would have to be issued by the Cincinnati court, Procter & Gamble would, of course, move to quash in the Ohio District Court. Presumably, that Court would make the same rulings it has twice made in the present case, i.e., it would quash the subpoena. The rulings of the Ohio court in the present case were not put upon any ground that would yield a different result if Rule 31 were employed. It follows, that the government's suggestion would lead full circle to precisely the present controversy.[11]

that a corporate officer answering interrogatories "shall furnish such information as is available *to the party*."

As Professor Moore points out, Rule 31 is simply a means of taking a witness' deposition, like the rule for oral depositions, Rule 30. See 4 Moore, *Federal Practice*, ¶31.02 (2d ed. 1950). This is a totally different matter from the Rule 33 procedure which searches the entire information available to a party, corporate or otherwise. Rule 33 is, of course, unavailable against Procter, inasmuch as Procter is not a party to the New York antitrust action.

[11] The Government points to its use of Rule 31 to obtain discovery from Procter of material useful to it in the preparation of its case. (Motion, p. 9). We trust by this reference that the Government does not mean to imply that it has made any use of Rule 31 in this case with respect to Procter that would have involved the coercive power of the New York court. In fact, the Government's Rule 31 notice was one to take the deposition of Procter's corporate secretary, whose address is in Cincinnati; it provided for the taking of the deposition in Cincinnati. Any coercive process, such as a subpoena necessary to enforce the deponent's attendance at the deposition would have to have been supplied by the Ohio District Court. In other words, except for the distinction in technique between oral and written

In sum, there are no suitable alternatives. The orders of the Ohio court are clearly final under the principles of *Horizons Titanium, supra*, and are subject to immediate appeal.[12]

C. The Appeal Properly Lies to This Court. Simultaneously with the appeal to this Court, Lever Brothers has taken an appeal to the Court of Appeals for the Sixth Circuit. *United States v. Lever Brothers Co.*, No. 15,766. On November 2, 1962, the Circuit Court entered an order deferring consideration of the jurisdictional questions raised in that appeal until this Court passed on Lever Brothers' appeal and motion for leave to file a petition for certiorari.

deposition, the Government's discovery device utilized in this case with respect to Procter was the same as Lever Brothers'. The only practical difference was that Procter opposed Lever Brothers' discovery in the Ohio court, whereas the Government and Procter reached a separate private settlement as to the Government's discovery from Procter.

The Government discovery from Procter was finally obtained under stipulation between the Government and Procter to which Lever Brothers was not a party. Under the stipulation, the Government agreed to withdraw its interrogatories in exchange for a voluntary disclosure of only part of the information requested of Procter.

[12] It is significant that Judge Peck was of the opinion that the rulings he entered were appealable. Counsel for Lever Brothers informed him: "Lever Brothers of course will appeal if the ruling is adverse to it. We just must have this information." Judge Peck responded as follows:

> The Court . . . I am perfectly frank to say that it was the knowledge that it would be passed upon before any disposition by the Court of Appeals that had some leverage on the decision that was reached here . . .

On being informed that the appeal would be taken to this Court Judge Peck broadened his reference from "Court of Appeals" to "reviewing court." Transcript of Proceedings, pp. 14-15, *In the Matter of United States of America v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 5058, S.D. Ohio, July 24, 1962.

Lever Brothers perfected appeals to both courts because, while the orders of the Ohio Court are unquestionably final, there was some question as to whether certain language in the Expediting Act permitted an appeal to be taken to this Court, even from such a final judgment.[13] In order fully to safeguard its appellate rights, Lever Brothers following approved procedure filed an appeal to this Court, under 15 U.S.C. 23, and to the Sixth Circuit under 28 U.S.C. 1291. *See Columbia Gas & Electric Corp. v. American Fuel & Gas Co.*, 322 U.S. 379, 381 (1944).

The Government, in the Court of Appeals, contended that the orders in question were subject to the Expediting Act (*Mem. in Support of Motion to Dismiss Appeal*, pp. 4-5 No. 15140, 6th Cir. 1962), and in this Court it does not press any objection to this Court's jurisdiction by reason of the Expediting Act, apart from the requirement of finality common both to the Expediting Act and to 28 U.S.C. 1291.

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[13] The question, as a technical matter, is whether the language of the Expediting Act: "In every civil action brought in any district court of the United States under any of said acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court," with its reference to "*the* district court", prevents an appeal to this court from the Ohio District Court. We suggest that since foreign discovery proceedings are closely related to the original action on the merits, it can be said that they are proceedings in which the United States is a complainant, and the order of that district court is an order of "*the* district court . . . in a civil action . . . wherein the United States is complainant," within the meaning of the Expediting Act. Clearly this would be the case where the United States was the party seeking foreign discovery against a nonparty; the United States there would be complainant in the trial court and in the foreign district court. The result should not be different where the defendant is seeking discovery and the United States affects a position of neutrality.

We submit that minor verbal problems in the wording of the Expediting Act do not militate against this court's jurisdiction over the present final orders of the Ohio District Court, and that the appeal from these final orders properly lies here. This Court is obviously the preferable forum. The Courts of Appeals have no experience in civil antitrust cases brought by the government and their unique discovery problems.[14] In the ordinary government civil antitrust case, where all discovery motions are passed on by the court which adjudicates the merits, the discovery orders are reviewed by this Court on appeal from the final judgment on the merits. Accordingly, it would be more logical not to carve out the single exception of foreign discovery proceedings for review by the Courts of Appeal.[15] Finally, as discussed below, enforcement of a policy of abstention by the foreign court in favor of action by the judge to whom the case is assigned for trial on the merits, would minimize, if it did not altogether eliminate, any burden upon this Court.

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[14] The Government's civil antitrust case is the classic example of the so-called "big case," as discussed in many seminars, including those reported at 23 F.R.D. 319 (1958); 21 F.R.D. 395 (1957); and 13 F.R.D. 41 (1952). Moreover, since review of discovery orders is intertwined with questions of substantive antitrust law, the suitability of this Court, the reviewing Court for Government civil antitrust litigation on the merits, as a forum for the review of such orders, is apparent.

[15] While the Courts of Appeals review Government criminal antitrust cases on appeal after conviction, the criminal rules do not provide for the extensive discovery provided for by the civil rules. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1180 (1960). Moreover, Section 7 of the Clayton Act, involved here, is not a criminal statute.

II. ALTERNATIVELY, A COMMON LAW WRIT OF CERTIORARI SHOULD ISSUE IN NO. 565, MISC.

A. We have filed, alternatively to the appeal in No. 487, a motion for leave to file a petition for a common law writ of certiorari under the All-Writs Act, 28 U.S.C. 1651 (No. 565, Misc.). This Court has exclusive jurisdiction under the expediting Act to review final judgments in government civil antitrust cases. But should this Court be of the opinion that the orders in question are not final, and if the error in the ruling made by the Ohio District Court cannot be attributed to the final judgment of the New York District Court, the ultimate review authority of this Court will be lost; the final decision on an important question of antitrust law will have been made by the district court in Ohio. Under these circumstances, there will be need to protect the ultimate review power of this Court, and the grant of a prerogative writ by this Court would be appropriate. *See State of Maryland v. Soper*, 270 U.S. 9, 30 (1926); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). The rulings by the Ohio District Court are so egregiously wrong, as we pointed out in our Jurisdictional Statement, and so inconsistent with the principles regarding the scope of proof accepted in antitrust cases under Section 7 of the Clayton Act, as to deny the trial court in New York, and the defendant, of material essential to the disposition of the case. (See our Motion for Leave to File Petition, pp. 8-9). Accordingly, this Court's power to issue a prerogative writ to protect its appellate jurisdiction should be utilized here.

B. Moreover, this case presents grave issues of proper judicial administration of the government anti-

trust "big case," of a nature closely analogous to those which have moved this Court to issue prerogative writs in antitrust litigation in the past. *See Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Alkali Export Ass'n v. United States*, *supra*.

The trial and pre-trial proceedings in this complex antitrust case were assigned to a single judge in the New York District Court on the Government's own motion that this is a "major antitrust action . . . a long and complicated case." (Mem. in Support of Gov't Motion for Assignment of Judge, Civil No. 135-219, S.D.N.Y., Feb. 5, 1960). There have been a number of pre-trial conferences during the four years in which the case has been pending. The New York court has received and ruled on a large number of motions including discovery proceedings involving Procter & Gamble. *See United States v. Lever Brothers Company and Monsanto Chemical Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961). To date, the Government alone has designated 104 separate trial witnesses, including various economic experts, and approximately 1,900 documents comprising from 15,000 to 20,000 pages. Under these compelling circumstances Lever Brothers moved the Ohio District Court to transfer Procter's objections to the discovery requests to the District Court in New York, where they would be covered by the single judge assignment, and could be passed upon by the judge who was familiar with the issues.

Procter & Gamble concedes that it "could have sought relief in the New York Court under Rule 30." (Brief of the Procter & Gamble Co., et al. In Opposi-

tion, p. 6).[16] While as a technical matter the Ohio Court had jurisdiction to pass on Procter's application,[17] in view of the circumstances of this protracted case sound judicial administration dictated that the Ohio court transfer the cause to the District Court in New York. Cf. *United States* v. *Kliphold*, 230 F.2d 494, 497-98 (2nd Cir. 1956); *United States* v. *Lester*, 21 F.R.D. 30, 31-32 (S.D. N.Y. 1957). Every requisite for a change of venue was present (see 28 U.S.C. 1404(a); *Hoffman* v. *Blaski*, 363 U.S. 335 (1960)), yet the Ohio court refused to transfer the cause without Procter & Gamble's consent.[18] The government does

[16] Relief equivalent to an order quashing the subpoena *duces tecum* could have been obtained by a protective order under Rule 30(b) from "the court in which the action is pending," i.e., the New York Court, to the effect that "certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters," or that "the deposition shall not be taken." It should be noted that Rule 45(d)(2), relating to subpoenas *duces tecum*, refers both to the motion to quash procedure established by Rule 45(d), and to the motion for protective order procedure available in the court in which the action is pending, provided by Rule 30(b).

[17] We do not, as Procter seems to believe, contest the jurisdiction of the Ohio Court to pass on Procter's motion (see Procter Brief in Opposition, p. 6). Our contention is that it was an abuse of discretion to have exercised that jurisdiction here.

[18] The District Court Judge in Ohio, (Peck, J.) indicated that he was well aware of the serious conflict created by a foreign judge ruling on a single discovery matter in the midst of a complicated case which has been proceeding for several years before one judge in another district court in another circuit. After ruling on all the motions presented and denying Lever Brothers' discovery application Judge Peck stated:

> "Let me say this, Mr. Krash, long after the fact. I of course agreed originally that it would be desirable to have this matter heard by Judge Dawson for the reasons that were explored at the time of the hearing and that it was not felt that this deponent could be required to go there. I afterwards had the thought that the entire thing might have been solved had Judge Dawson been designated to sit as a judge in this District, which could have been done with

but deny[19] the power of the Ohio District Court to transfer the case.[20] See *Equitable Trust Co. v. Schaebel*, 40 F. Supp. 112, 114 (E.D. Pa. 1941), aff'd, 117 F.2d 738 (3d Cir. 1941).

Had the Ohio Court refrained from passing on these questions itself, and transferred the matter to the New York Court for disposition, the integrity of the single-judge assignment would have been preserved,[21] and the jurisdictional issue now presented would have been avoided. Moreover, this procedure would have fostered the policy of expeditious enforcement of the antitrust laws.

In the context of this complicated antitrust case in which a single-judge assignment had been made, the Ohio Court's action in passing on the matter presented

the cooperation of the Chief Judges in the Courts of Appeals." Transcript of Proceedings, p. 19, *In the Matter of United States of America v. Lever Brothers Co. and Monsanto Chemical Co.*, Civil No. 7054, S.D. Ohio, July 24, 1962.

[19] See Jurisdictional Statement, p. 18. In the Ohio District Court, the Government expressed uncertainty as to the existence of the power, but did not deny it, and stated that it would not oppose transfer of the matter to the New York District Court. See letter from Assistant Attorney General Lee Loevinger, Esq. to Hon. John Peck, May 23, 1962, quoted in Jurisdictional Statement, p. 18.

[20] In addition to the general transfer power, under 28 U.S.C. § 1404 (a), which we think clearly applicable to the present situation, and the general power of the courts to order a person within their jurisdiction to appear in litigation elsewhere, evidenced by the *Schaebel* case, an obvious procedural device was available to the Ohio Court. It could have denied the motion to quash without reaching the merits, and without prejudice to the submission to the New York Court of a motion to vacate the notice of deposition or for a protective order under Rule 30(b).

[21] See the authorities on the single-judge assignment system set forth in our Jurisdictional Statement, pp. 17-18.

constituted an abuse of discretion. It is administratively intolerable that the conduct and outcome of a major antitrust case, already in progress for four years, should hinge on the single determination of a judge sitting in the district where vital documents happen to be controlled. The apportionment of responsibility among the district courts in different circuits, like the apportionment of responsibility between courts and administrative agencies, is uniquely within the province of this Court and is rightfully performed in appropriate cases by the issuance of its prerogative writs. *Far East Conference* v. *United States*, 342 U.S. 570 (1952); and *United States Alkali Export Assn., Inc.* v. *United States*, 325 U.S. 196 (1945). In furtherance of its supervisory control over the district courts, this Court should issue a writ of certiorari and grant a plenary review. *See La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957); *Atlas* v. *Mace*, 265 F.2d 312 (7th Cir. 1959), *cert. denied*, 362 U.S. 941 (1960).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted in No. 187. Alternatively, the petition for leave to file a petition for writ of certiorari in No. 303, Misc. and the petition should be granted. Should the Court desire further argument on the jurisdictional question, we respectfully suggest that an order be entered postponing resolution of the jurisdictional question until argument on the merits in No. 187, and that argument on the motion for leave to file the

petition for writ of certiorari in No. 565, Misc., and the merits thereof, be had at the same time.

Respectfully submitted,

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